

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STEPHEN ROBINS :
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 1999 through August 31, 2001. :

ORDER
DTA NOS. 819602,
819603, 819604
AND 819605

In the Matter of the Petition :
of :
ROCKWELLS RESTAURANT CORP. :
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period December 1, 1998 through August 31, 2001 :
for the Quarters ended November 30, 2000 through :
February 28, 2002. :

Petitioner Stephen Robins, 97 Brookby Road, Scarsdale, New York 10583, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1999 through August 31, 2001. Petitioner Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1998 through August 31, 2001 and for the quarters ended November 30, 2000, February 28, 2001, May 31, 2001, August 31, 2001, November 30, 2001 and February 28, 2002.

A hearing was scheduled before Administrative Law Judge Thomas C. Sacca at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on Tuesday, May 25, 2004 at 10:30 A.M. Petitioners failed to appear and four default determinations were duly issued. Petitioners have made a written request dated July 24, 2004 that the default determinations be vacated. On September 1, 2004, the Division of Taxation filed a response in opposition to petitioners' application to vacate the defaults.

Petitioner Stephen Robins appeared on his own behalf and on behalf of Rockwells Restaurant Corp. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determinations be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. For the five sales and use tax quarters commencing on September 1, 2000 and running through November 30, 2001, petitioner Rockwells Restaurant Corp. ("Rockwells") filed sales and use tax returns reporting in the aggregate \$320,217.40 in tax due. Eleven of the checks submitted during this period by Rockwells in payment of the tax due were dishonored by its bank. As a result, the Division of Taxation issued notices and demands L-019517103, L-020107359, L-020687413, L-020884050 and L-021140745, for a total of \$318,794.47, consisting of \$254,162.42 in tax, \$19,753.58 in interest and \$44,879.43 in penalty. Rockwells filed five requests for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") (CMS No. 188507, 190112, 192342, 193176 and 193196). Rockwells'

requests were denied on May 9, 2003. Rockwells filed a petition (DTA # 819604) with the Division of Tax Appeals asking only that penalty be abated.

2. For the period December 1, 2001 through February 28, 2002, Rockwells filed its quarterly sales and use tax return reporting \$66,134.53 in tax due. The three checks submitted by Rockwells in payment of the tax due were all dishonored by its bank. As a result, the Division of Taxation issued Notice and Demand L-021585761 in the amount of \$81,460.27 consisting of tax of \$66,134.53, interest of \$4,709.60 and penalty of \$10,616.14. Rockwells filed a request for a conciliation conference with BCMS (CMS No. 194935). Its request was denied on May 9, 2003, and it filed a petition (DTA # 819605) with the Division of Tax Appeals asking only that penalty be abated.

3. On August 23, 2001 the Division of Taxation commenced a sales tax field audit of Rockwells. Rockwells' sales records were reviewed in detail and no additional tax was found due with respect to its sales. However, additional tax was determined to be due with respect to Rockwells' asset purchases and expenses in the amount of \$10,406.82 with interest of \$1,895.56. Penalty was not assessed. On August 12, 2002, the Division issued Notice of Determination L-021379053 in the amount of \$12,302.38. Rockwells filed a request for a conciliation conference with BCMS (CMS No. 194504). Its request was denied on May 9, 2003, and it filed a petition (DTA # 819603) with the Division of Tax Appeals asking only that penalty be abated.

4. On September 3, 2002, the Division of Taxation issued Notice of Determination L-021387289 to petitioner Stephen Robins as a responsible officer of Rockwells Restaurant Corp. for the period June 1, 1999 to August 31, 2001. The determination asserted tax due in the amount of \$8,354.28 and interest of \$1,346.17 for a total of \$9,700.45. No penalty was asserted due. Mr. Robins filed a request for a conciliation conference with BCMS (CMS No. 194505).

His request was denied on May 9, 2003, and he filed a petition (DTA # 819602) with the Division of Tax Appeals asking only that penalty be abated.

5. The assistant calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated November 18, 2003 to petitioners and to the Division of Taxation advising them to contact each other to set a mutually convenient hearing date during the months of March or April 2004. The hearing was initially scheduled for March 25, 2004 but was rescheduled to May 25, 2004 in order to allow the parties time to reach a resolution of these matters without the need for a hearing.

6. On March 19, 2004, Ms. Murphy wrote to Mr. Robins to give him one last opportunity to qualify for the Division's amnesty program. She informed him that:

If you sign the withdrawals by March 24, 2004, your denial of Amnesty will be reversed on March 31st and payment must be received by April 12th. Failure to make payment within the time stated will result in default, penalty and interest will remain and you will lose your protest rights.

Mr. Robins never signed the withdrawal of hearing or made the payments referenced by Ms. Murphy in her letter.

7. On March 23, 2004, Administrative Law Judge Joseph W. Pinto, Jr. advised the parties that:

Pursuant to our telephone conversation of earlier today, the above-referenced matters have been adjourned for 60 days and the hearing originally scheduled for Thursday, March 25, 2004 has been postponed until May 25, 2004. If there remains a need for a hearing on that date, it will occur at the Division of Tax Appeals in Troy, NY.

8. On April 19, 2004, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that the hearing was scheduled for May 25, 2004 in Troy, New York.

9. On May 25, 2004 at 10:30 A.M., Administrative Law Judge Thomas C. Sacca called *The Matter of Stephen Robins and The Matter of Rockwells Restaurant Corp.*, involving the petitions here at issue. Present was Ms. Murphy as representative for the Division of Taxation. Petitioners did not appear, and no representative appeared on their behalf. The attorney for the Division of Taxation moved that petitioners be held in default.

10. On May 28, 2004, Administrative Law Judge Sacca issued determinations finding petitioners in default.

11. On July 29, 2004, petitioners filed an application to vacate the May 28, 2004 default determinations. In the application, Mr. Robins explained that he did not attend the hearing because he thought that the matter would be resolved through amnesty. He indicated that “I made a phone call to the tax department around mid-May and was told that my amnesty was reinstated and a notice had been sent to us.”

12. On September 1, 2004, the Division of Taxation filed a letter in opposition to the application to vacate the default determinations. In her letter, Ms. Murphy points out that petitioners lacked reasonable cause for their failure to appear at hearing:

To reiterate, Mr. Robins knew what needed to be done to avoid a Division of Tax Appeals hearing and to obtain the relief for which he petitioned. Yet, he chose not to sign the document that would have eliminated the need for a hearing and failed to pay the necessary tax and reduced amnesty interest that would have enabled these liabilities to be closed under amnesty. Whether petitioners intended to obtain amnesty but were unable to do so because of unforeseen circumstances or were merely trying to delay collection of the tax is unimportant. Petitioners had the options either to withdraw their petitions as part of the amnesty process or appear at hearing. Since they failed to withdraw their petitions, they should have appeared at hearing.

Moreover, Ms. Murphy argues that petitioners have failed to demonstrate a meritorious case:

How can petitioners argue a meritorious case for abatement of penalty if these notices encompassed six sales tax quarters where most returns were filed with no remittance (dishonored checks or non-remit returns)? . . . Further, the length of time and the number of incidents involved (i.e., non-remit returns filed) compellingly suggests that the non-payment could not have been inadvertent or otherwise attributable to an oversight.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.15[b][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioners did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law judge correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default orders were issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that they had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Morano’s Jewelers of Fifth Avenue, supra*).

C. Initially it is noted that two petitions, DTA# 819602 and DTA# 819603 involve assessments wherein no penalty was assessed. Nevertheless, the only relief sought in these two

petitions is “elimination of all penalties.” It would be pointless to vacate the default determinations for these two petitions since they seek no relief that could be granted in any event.

D. Petitioners have failed to demonstrate that they had reasonable cause for their failure to appear for their hearing. Mr. Robins was informed quite clearly what he had to do to qualify for amnesty. He did not do what was asked of him and he knew that he did not do it. His claims of confusion are simply not believable. Mr. Robins failed to appear for his hearing by his own choice. Having intentionally defaulted, he cannot demonstrate that he had reasonable cause for his failure to appear at hearing.

Mr. Robins’s claims regarding a telephone conversation with the Tax Department can be given no weight. Mr. Robins has provided no details whatsoever. His claim is so lacking in any specifics that it cannot and need not be rebutted by the Division of Taxation.

E. Petitioners have also failed to demonstrate that they have a meritorious case. Over the course of a year and one half, petitioner Rockwells Restaurant Corp repeatedly remitted bad checks to the Tax Department. Petitioner’s writing of bad checks was so strikingly consistent it could only have been intentional. Petitioner has not even attempted to explain how it came to issue so many bad checks.

F. It is ordered that the July 29, 2004 request to vacate the default determinations be, and it is hereby, denied and the Default Determinations issued on May 28, 2004 are sustained.

DATED: Troy, New York
December 2, 2004

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE